FLUID PERSONALITY: INDIGENOUS RIGHTS AND THE *TE AWA TUPUA (WHANGANUI RIVER CLAIMS SETTLEMENT) ACT 2017* IN AOTEAROA NEW ZEALAND

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In March 2017, the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 (NZ) ('Te Awa Tupua Act') became the first piece of legislation in the world to declare a river a legal person. Through this grant of legal personality the Whanganui River acquires the rights, duties, powers and liabilities of an entity with legal standing including the ability to sue those who harm it. This legislation is aimed at reconciling the relationship between the government of Aotearoa New Zealand and its Indigenous peoples (Māori) in light of the principles of the Treaty of Waitangi, one of the founding documents of Aotearoa New Zealand. However, the Te Awa Tupua Act also offers a platform to explore the promotion and protection of Indigenous rights in international human rights law including the United Nations Declaration on the Rights of Indigenous peoples in relation to Māori in Aotearoa New Zealand. This inquiry demonstrates that despite the novelty of the legislation and the exciting progress towards re-establishing Māori governance and management over the River that they held for centuries before European colonisation, the innovative grant of legal personality to a river does not fully address past wrongs in that it continues to exclude Māori ownership of freshwater. Ultimately the Te Awa Tupua Act leaves Aotearoa New Zealand wanting in its commitments under international human rights law.

CONTENTS

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I INTRODUCTION

The use of legal devices to protect natural resources is not new; there is a convergence of decisions across a divergent range of jurisdictions which, with varying degrees of success, have endowed natural resources with legal personality. In 2008 and 2009 Ecuador and Bolivia, respectively, declared nature to be a legal person at a constitutional level.[1] Further North, in 2010 Pittsburgh, Pennsylvania in the United States followed suit.[2] In 2014, the government of New Zealand declared the Te Urewera National Park a legal person.[3] In November 2016, the Constitutional Court of Colombia declared the Atrato River to be a legal person, and at the end of March 2017 the High Court in the State of Uttarakhand in India declared an ecosystem including glaciers, lakes, forests and wetlands to have legal personality and also granted personality to the Ganges and Yamuna Rivers.[4] It has not, however, been smooth sailing. More recently in the United States, a lawsuit filed by an environmental group asking a judge to grant the same rights as a person to the Colorado River was dismissed with prejudice in December 2017.[5] The lawyer in the suit was threatened by the Attorney-General's office that his firm would be liable for financial penalties and that he could be subject to disbarment on the basis that the case was unlawful and frivolous.[6]

However, the first piece of legislation in the world to declare a river a legal person was enacted in Aotearoa New Zealand in the *Te Awa Tupua (Whanganui*

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1 *Constitución de la República del Ecuador 2008* [Constitution of the Republic of Ecuador 2008] (Ecuador) arts 71–4 [tr author]; *Ley de Derechos de la Madre Tierra 2010* [The Law of Mother Earth] (Bolivia) No 071, 21 December 2010 [tr author]. See Erin L O'Donnell and Julia Talbot-Jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' (2018) 23(1) *Ecology and Society* 7, 7. See also Gwendolyn J Gordon, 'Environmental Personhood' (2018) 43(1) *Columbia Journal of Environmental Law* 49.

2 In 2010, Pittsburgh, Pennsylvania declared nature a legal person. In 2012 the state legislature enacted legislation to override this. However, the Pennsylvania Supreme Court declared this law unconstitutional in *Robinson Township v Commonwealth of Pennsylvania*, 52 A 3d 463 (Pa, 2012). See Dinah Shelton, 'Nature as a Legal Person' (2015) 15(2) *VertigO: La Revue électronique en sciences de l'environnement* 1.

3 *Te Urewera Act 2014* (NZ) s 11 ('*Te Urewera Act*').

4 *Centro de Estudios para la Justicia Social 'Tierra Digna' v la Presidencia de la República* (Corte Constitucional) [Colombian Constitutional Court], T-622 Sala Sexta de Revisión, 10 November 2016, 153; *Salim v State of Uttarakhand* [2017] SCC OnLine Utt 367 (20 March 2017) [19] (Rajiv Sharma J, Alok Singh J) (High Court of Uttarakhand). See generally Elizabeth Macpherson and Felipe Clavijo Ospina, 'The Pluralism of River Rights in Aotearoa, New Zealand and Colombia' (2015) 25(6) *Journal of Water Law* 283.

5 The Colorado River Ecosystem, 'Unopposed Motion to Dismiss Amended Complaint with Prejudice', Submission in *The Colorado River Ecosystem v State of Colorado*, 17cv02316 – NYW, 3 December 2017; Lindsay Fendt, 'Colorado River "Personhood" Case Pulled by Proponents', *Aspen Journalism* (online, 5 December 2017) <https://www.aspenjournalism.org/2017/12/05/colorado-river-personhood-case-pulled-by-proponents>, archived at <https://perma.cc/85XZ-GGKV>.

6 Chris Walker, 'Attorney to Withdraw Colorado River Lawsuit under Threat of Sanctions', *Westword* (online, 4 December 2017) <http://www.westword.com/news/colorado-river-lawsuit-to-be-withdrawn-due-to-potential-sanctions-9746311>, archived at <https://perma.cc/3RBH-RW98>.

River Claims Settlement) Act 2017 (NZ) ('*Te Awa Tupua Act*').[7] Through this *Act* the Whanganui River ('the River') has acquired the rights, duties, powers and liabilities of an entity with legal standing including the ability to sue those who harm it.[8] The River is the third longest in Aotearoa New Zealand.[9] It is situated in the North Island and stretches for 290 kilometres from the central plateau to the sea, starting at Mount Tongariro and flowing south west to the coast at Whanganui.[10]

Prior to the arrival of Europeans, areas along the River were some of the most densely populated by Māori.[11] A number of iwi (Māori tribes) had authority over the various areas along the River where they lived, depending upon it for their very existence.[12] After the arrival of Pākehā (Europeans/settlers) and the signing of the *Te Tiriti o Waitangi* ('*Treaty of Waitangi*') in 1840,[13] Pākehā understood that ownership of the River was no longer vested in the Whanganui iwi.[14] However, Whanganui iwi never relinquished their rights to the River and have asserted their claim to it since 1873.[15] In 1990 a claim relating to the Whanganui River was filed in the Waitangi Tribunal on behalf of the Whanganui iwi.[16] The Waitangi Tribunal was established under the *Treaty of Waitangi Act 1975* (NZ) as a standing commission of inquiry into claims brought by Māori relating to

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7 *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 14 ('*Te Awa Tupua Act*'). For media coverage on this grant of legal personality, see 'What It Means to Give the Whanganui River the Same Rights as a Person', *RNZ* (online, 16 March 2017) <https://www.rnz.co.nz/news/the-wireless/374515/what-it-means-to-give-the-whanganui-river-the-same-rights-as-a-person>, archived at <https://perma.cc/L3PP-GX7P>.

8 *Te Awa Tupua Act* (n 7) s 14.

9 'Whanganui', *Lawa* (Web Page) <https://www.lawa.org.nz/explore-data/manawatu-wanganui-region/river-quality/whanganui/>, archived at <https://perma.cc/9R3R-CAS6>.

10 Ibid; Diana Beaglehole, 'Whanganui Places: Whanganui River', *Te Ara: The Encyclopedia of New Zealand* (Web Page, 15 June 2015) <https://teara.govt.nz/en/whanganui-places/page-5>, archived at <https://perma.cc/H68X-6X4V>.

11 *Ruruku Whakatupua: Te Mana o Te Iwi o Whanganui*, Whanganui Iwi–Crown, signed 5 August 2014 (Deed of Settlement) [1.5].

12 Ibid [1.4]–[1.5], [2.27].

13 An English translation of *Te Tiriti o Waitangi 1840* ('*Treaty of Waitangi*') is scheduled to the *Treaty of Waitangi Act 1975* (NZ) sch 1 ('*Treaty of Waitangi Act*').

14 James DK Morris and Jacinta Ruru, 'Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water?' (2010) 14(2) *Australian Indigenous Law Review* 49, 49. The *Treaty of Waitangi* (n 13) is considered to be Aotearoa New Zealand's founding document. It was entered into by the Crown and a number of Māori chiefs (but not all) to record an agreement as to how Aotearoa New Zealand was to be governed. This has been a controversial document because the Māori version of the agreement was quite different in meaning to the English version. In particular, the English version of the treaty declared that Māori chiefs had ceded sovereignty to the Crown while the Whanganui iwi believed that they would continue to have authority over the River and live by the principle of *kaitiakitanga* (guardians/stewards) regarding the natural resources that they had always been responsible for and which were important aspects of their lives both physically and spiritually. They never believed that they had relinquished *kaitiakitanga* over the River: see Morris and Ruru (n 14) 49. See generally IH Kawharu (ed), *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, 1989); Matthew SR Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, 2008).

15 *Record of Understanding in Relation to the Whanganui River Settlement*, Whanganui Iwi–Crown, signed 13 October 2011 (Record of Understanding) [1.7]–[1.8].

16 *Ruruku Whakatupua: Te Mana o Te Iwi o Whanganui* (n 11) [1.13].

Crown breaches of the promises made in the *Treaty of Waitangi*.[17] Between 2002 and 2004 negotiations with the Crown took place, although agreement was never reached.[18] Further discussions took place in 2009 in which the Whanganui iwi expressed their overarching wish to ensure the care, protection, management and use of the River for the benefit of the River itself, the Whanganui iwi and Aotearoa New Zealand.[19]

Finally, in March 2017 a settlement between the government and the Whanganui iwi was codified in the *Te Awa Tupua Act* in an effort to address past wrongs.[20] Although the legislation does not give the Whanganui iwi ownership of the River, it records a compromise made between the parties to give the River the rights of a legal person enabling it to do all things any entity with legal personality can do,[21] most importantly, take action to defend itself from harm. A truly novel solution to protect a river.[22]

On the face of it, the grant of legal personality in this way seems to be an innovative legal tool for the enhancement and protection of human rights and in particular Indigenous rights. In doing this, the *Te Awa Tupua Act* reflects the cosmovision (worldview) of Indigenous peoples as well as many of the provisions and protections that have been afforded to people under international

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17 *Treaty of Waitangi Act* (n 13) ss 4–6; 'About the Waitangi Tribunal', *Ministry of Justice, New Zealand Government* (Web Page, 16 April 2019) <https://www.waitangitribunal.govt.nz/about-waitangi-tribunal/>, archived at <https://perma.cc/J522-85YW>.

18 *Ruruku Whakatupua: Te Mana o Te Iwi o Whanganui* (n 11) [1.18].

19 Ibid [1.3], [1.19].

20 *Ruruku Whakatupua* (*The Whanganui River Deed of Settlement*) was signed by the New Zealand government and Whanganui iwi on 5 August 2014 and is made up of two documents: *Ruruku Whakatupua: Te Mana o Te Awa Tupua*, Whanganui Iwi–Crown, signed 5 August 2014 (Deed of Settlement) and *Ruruku Whakatupua: Te Mana o Te Iwi o Whanganui* (n 11). The former sets out the establishment of a new legal framework for the Whanganui while the latter sets out cultural and financial redress to Whanganui iwi. See 'Whanganui Iwi (Whanganui River) Deed of Settlement Summary 5 Aug 2014', *New Zealand Government* (Web Page, 31 October 2016) <https://www.govt.nz/treaty-settlement-documents/whanganui-iwi/whanganui-iwi-whanganui-river-deed-of-settlement-summary-5-aug-2014/>, archived at <https://perma.cc/8SYJ-B99S>.

21 *Te Awa Tupua Act* (n 7) s 14. Examples of entities that are legal persons are companies and trusts: *New Zealand Law Dictionary* (6th ed, 2005) 'legal person'.

22 This solution was raised in Alex Frame, 'Property and the Treaty of Waitangi: A Tragedy of the Commodities?' in Janet McLean (ed), *Property and the Constitution* (Hart Publishing, 1999) 224, 237; Morris and Ruru (n 14) 53. This builds on Christopher Stone's work where he argued that natural resources should be given legal personality to enable better environmental protection: Christopher D Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45(2) *Southern California Law Review* 450. See also Katherine Sanders, '"Beyond Human Ownership"? Property, Power and Legal Personality for Nature in Aotearoa New Zealand' (2018) 30(2) *Journal of Environmental Law* 207; Katie O'Bryan, 'Giving a Voice to the River and the Role of Indigenous People: The Whanganui River Settlement and River Management in Victoria' (2017) 20(1) *Australian Indigenous Law Review* 48; Jacinta Ruru, 'Indigenous Restitution in Settling Water Claims: The Developing Cultural and Commercial Redress Opportunities in Aotearoa, New Zealand' (2013) 22(2) *Pacific Rim Law and Policy Journal* 311, 340 ('Indigenous Restitution in Settling Water Claims'); Jacinta Ruru, 'Legal Indigenous Recognition Devices' (2016) 8(26) *Indigenous Law Bulletin* 26, 28 ('Indigenous Recognition Devices'); Linda Te Aho, 'Te Awa Tupua (Whanganui River Claims Settlement) Bill: The Endless Quest for Justice' (August 2016) *Māori Law Review*; Abigail Hutchison, 'The Whanganui River as a Legal Person' (2014) 39(3) *Alternative Law Journal* 179.

human rights law.[23] However, in reality, the *Act* does not offer significant change to the Whanganui iwi's ability to govern and manage the River; most significantly it does not afford the Whanganui iwi ownership of the River.

This article examines the granting of legal personality to the River under the *Te Awa Tupua Act* in light of international human rights law. The first part details the core provisions of the *Te Awa Tupua Act* focusing on its grant of legal personality to the River and the principal limitations within the *Act*. With this background in mind, Part II explores how the *Te Awa Tupua Act* recognises Indigenous peoples and their worldview, in particular the Whanganui iwi, through its understanding of the River, its grant of legal personality to the River and in turn its scheme of co-governance and co-management. It concludes that the *Te Awa Tupua Act* reflects the ethos of international human rights law including its recognition of the close relationship between the protection of culture and lands, territories and resources. However, it asserts that the *Te Awa Tupua Act* does not go beyond the recognition of this gloss. Part III then demonstrates how the *Act*'s grant of legal personality fails to afford Indigenous peoples with the material protections offered by international human rights law in relation to core property rights in light of Māori advocacy for the ownership of freshwater. It concludes with an exploration of Aotearoa New Zealand's failure to live up to its human rights commitments by contextualising it within the setting of both domestic politics in Aotearoa New Zealand and more broadly that of international human rights law.

II *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*

Under the *Te Awa Tupua Act*, the River is recognised and described as Te Awa Tupua.[24] Most importantly, the *Act* declares Te Awa Tupua to be a legal person.[25] A legal person is defined as '[a]n entity on which a legal system confers rights and imposes duties'.[26] It is usually a natural person or an artificial or statutory body, a common example being a company.[27] It has rights, duties, powers and liabilities including the ability to sue or be sued; in other words, a legal person has legal standing.[28] The use of legal personality as a tool to confer legal standing on natural resources has been used in settlement agreements

23 See below Parts III(A)(1)–(3).
24 *Te Awa Tupua Act* (n 7) s 12.
25 Ibid s 14.
26 *New Zealand Law Dictionary* (6th ed, 2005) 'legal person'.
27 Ibid.
28 See Morris and Ruru (n 14) 53.

between the Crown (New Zealand government) and Māori pertaining to breaches of the *Treaty of Waitangi*.[29]

While the use of legal personality appears to provide the River with authority and control over itself, in practice its legal rights are limited. This is because the *Te Awa Tupua Act* does not vest ownership of all parts of the River in Te Awa Tupua. The only fee simple estate transferred to it is that owned by the government, which comprises only parts of the riverbed and the *pakohe*, gravel, sand and shingle in or on the vested land.[30] Furthermore, there are existing property rights to other parts of the riverbed that remain in private ownership. The *Te Awa Tupua Act* specifically excludes any legal roads, railway infrastructure, structures or the riverbed held under the *Public Works Act 1981* (NZ) or located in the marine or coastal area from vesting in Te Awa Tupua.[31] However, the parts of the riverbed that are not owned or held by the Crown (as long as it is not Māori land) are able to be transferred to, or vested in, Te Awa Tupua (subject to the consent of any other charges or interests in the land).[32]

The fact that Te Awa Tupua does not have title to all of its own riverbed is curious in light of the fact that under s 12 of the *Te Awa Tupua Act*, Te Awa Tupua is an 'indivisible and living whole, comprising the Whanganui River from the mountains to the sea'.[33] It is the riverbed, riverbanks, plants, animals, fish and water. Yet arguably, the most significant limitation on its powers is that it does not own the water that is inextricably part of the River. The vesting of parts of the riverbed in Te Awa Tupua does not create or transfer a proprietary interest in the water because, under common law, water is incapable of being owned.[34] Therefore, even though Te Awa Tupua comprises the Whanganui River, its rights of ownership are limited to only parts of the riverbed and *not* the water. An example of this anomaly is that there is no requirement for consent be obtained from Te Awa Tupua to use the water.[35] Under the *Resource Management Act*

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29 See *Te Urewera Act* (n 3) s 11. Such settlement agreements include *Ruruku Whakatupua: Te Mana o Te Iwi o Whanganui* (n 11); *Ruruku Whakatupua: Te Mana o Te Awa Tupua* (n 20). However, with this grant of legal personality, the *Te Awa Tupua Act* (n 7) represents a further development in the story of the relationship between the government and Māori concerning water management. Previously, co-governance and co-management in relation to freshwater had been set out in the *Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010* (NZ) s 35, sch 1 s 4 ('*Waikato-Tainui Act*'). Co-governance is reflected in the Waikato River Authority which is made up of equal numbers of Crown and iwi appointed members who monitor the implementation of the *Waikato-Tainui Act*: at ss 22–4, sch 6 s 2. Co-management is reflected in agreements that provide for the joint management by local authorities and Waikato-Tainui: at ss 41–3.

30 *Te Awa Tupua Act* (n 7) s 41. Note that the vesting of the *pakohe*, gravel, sand and shingle occurs despite *Crown Minerals Act 1991* (NZ) s 11(1).

31 *Te Awa Tupua Act* (n 7) s 41(2).

32 Ibid s 48(2). This also applies to Māori freehold land: at s 49(1).

33 Ibid ss 12, 41.

34 Sanders (n 22) 215, 226. *Te Awa Tupua Act* (n 7) ss 16, 46.

35 *Te Awa Tupua Act* (n 7) s 46(3). The phrase 'to use water' is defined as including 'to take, dam, divert, or discharge into water': at s 46(4).

1991 (NZ) ('*RMA*'),[36] Te Awa Tupua only *may* be considered an 'affected person' for applications for resource consents relating to the water in the River.[37]

Beyond ownership, there are further limitations under the *Te Awa Tupua Act* that affect Te Awa Tupua's ability to fully govern and manage the River. First, any existing rights to the River are preserved, including those of private citizens, other entities and local authorities:

- 'existing public use of, and access to and across, the Whanganui River';
- 'existing private property rights';
- 'existing rights of State-owned enterprises and mixed ownership model companies';
- 'existing resource consents and other existing statutory authorisations';
- fishing rights;
- 'existing ownership of, and consents for, lawful structures in or on any part of the Whanganui River';
- 'statutory functions, powers, and duties of the relevant local authorities'; and
- any other legislation (except as provided for in the *Te Awa Tupua Act*).[38]

Secondly, the *Te Awa Tupua Act* declares any part of the riverbed vested in Te Awa Tupua to be a conservation area, a national park or a reserve if those areas were designated as such prior to the vesting.[39] This means those areas will be subject to the law pertaining to such designations which places further limitations on Te Awa Tupua's authority over them.

Thirdly, the *Te Awa Tupua Act* limits Te Awa Tupua's ability to deal with its land. The land cannot be alienated by sale, gift, mortgage, charge or transfer.[40] Te Awa Tupua's right to minerals in or on the land is limited because the *Te Awa Tupua Act* does not affect the government's ability to own minerals under the *Crown Minerals Act 1991* (NZ) or any lawful rights to subsurface minerals.[41] Furthermore, the provisions of the *Te Awa Tupua Act* will defer to other legislation unless otherwise stated, which also reduces its effectiveness.[42]

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36 The *Resource Management Act 1991* (NZ) ('*Resource Management Act*') is a significant piece of legislation in New Zealand. Its purpose is 'to promote the sustainable management of natural and physical resources': at s 5(1).

37 See ibid s 95E; O'Bryan (n 22) 57. In relation to control over the surface of the water, a group comprising iwi, the Department of Conservation, Maritime New Zealand and relevant local authorities, has been set up to improve and coordinate the management of activities on the water: *Te Awa Tupua Act* (n 7) ss 64(1)–(2). This group must consult Te Pou Tupua and report to the relevant government Ministers listed in s 64(6): at s 64(4).

38 *Te Awa Tupua Act* (n 7) s 46(2).

39 Ibid s 40 initially removes the existing status of the areas prior to vesting, and then s 42 restores it after vesting.

40 Ibid s 43.

41 Ibid s 44(2).

42 Ibid s 16.

III THE *TE AWA TUPUA (WHANGANUI RIVER CLAIMS SETTLEMENT) ACT 2017*: RECOGNISING INDIGENOUS PEOPLES

At its core, the *Te Awa Tupua Act* is about the acknowledgement of the significance of the River to the Indigenous peoples of Aotearoa New Zealand, the Māori, and in particular the Whanganui iwi who assert an important connection to it. From the beginning, it states its purpose is to record the acknowledgements of, and apology by, the government to Whanganui iwi and to give effect to the provisions of the deed of settlement between them.[43] These government acknowledgements and the apology are highly significant and important parts of this legislation.[44] 'The Crown acknowledges and respects the intrinsic connection between the iwi and hapū of Whanganui and the Whanganui River reflected in the Whanganui pepeha, "Ko au te awa, ko te awa ko au".'[45]

The clear intention of the *Te Awa Tupua Act* is to record the settlement with the Whanganui iwi and in doing so provide a legal mechanism to ensure Māori have the ability to co-govern and co-manage and thereby protect the River for the future of their people.[46] The provision covering the Crown's acknowledgement states that

> [t]he Crown acknowledges that through this settlement Whanganui Iwi have sought to bring all the iwi, hapū, and other communities of the Whanganui River together for the common purpose of upholding and protecting the mana of the Whanganui River and its health and well-being for the benefit of future generations and, ultimately, all of New Zealand.[47]

In its embrace of this anthropocentric framework — a framework which aims to reconcile the relationship between Pākehā and Māori — a broader contextual reading of the *Te Awa Tupua Act* demonstrates that its provisions, including the grant of legal personality to Te Awa Tupua, flow from recognition of an Indigenous worldview. In turn, the *Act* reflects the ethos of the protections for Indigenous peoples entrenched in international human rights law.

A *The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 and the Indigenous Cosmovision*

The *Te Awa Tupua Act* reflects the unique relationship that many Indigenous peoples have with nature and their understanding of property which is intimately bound up with culture and self-determination, standing in contrast to Western conceptions of property.

1 *Western and Indigenous Conceptions of Property*

Property has been described as a 'category of cardinal importance in the common law, around which important politico-philosophical theories have been developed'.[48] It is suggested that the right to property is the most widely

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43 Ibid s 3.

44 Ibid ss 69–70.

45 Ibid s 69(3). The translation is 'I am the river and the river is me': at s 13(c).

46 Ibid s 69.

47 Ibid s 69(18).

48 Lyndel V Prott and Patrick J O'Keefe, '"Cultural Heritage" or "Cultural Property"?' (1992) 1(2) *International Journal of Cultural Property* 307, 309.

protected right in domestic legal systems, codified in constitutions throughout the world.[49]

This widely protected right to property has specific contours shaped by Western conceptions dating back to Roman law principles. These were rooted in notions of absolute ownership, monetary compensation and the examination of acquisition as the defining element of legitimate property.[50] In his well-known article, AM Honoré described the Western concept of ownership of something as comprising a number of liberties, rights, powers and duties.[51] Although a number of different combinations have been suggested, those traditionally associated with ownership in this panoply or 'bundle' includes: control of the use of the property,[52] the right to any benefit from the property, a right to transfer or sell the property, a right to exclude others from the property and a right to alienate the property.[53] Although there is no combination common to all forms of property in all situations, implicit in this 'bundle' of rights and its extensive protection emerges the core features of the Western conception of property. This includes that it is an individual and social right, and perhaps most ubiquitously, viewed as a commodity.[54] Combined with the Western understanding that people are considered to be dominant over animals and the environment, this has been expressed as the right to own and control nature.[55] In turn, this commodification served as the justification of many colonisers for confiscating Indigenous lands and resources.[56] John Locke outlined the quintessential European position of the land and resource rights of Indigenous peoples, noting that they had no rights to lands and resources that they did not cultivate.[57] In turn, it was not viewed as

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49 Karolina Kuprecht, 'The Concept of "Cultural Affiliation" in NAGPRA: Its Potential and Limits in the Global Protection of Indigenous Cultural Property Rights' (2012) 19(1) *International Journal of Cultural Property* 33, 51.

50 Ibid 36.

51 AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107.

52 In theory, this even extends to the destruction of the property. See Joseph L Sax, *Playing Darts with a Rembrandt: Public and Private Rights in Cultural Treasures* (University of Michigan Press, 1999) discussing whether or not individuals should be allowed to destroy cultural treasures.

53 See generally Honoré (n 51). It is worth noting that a body of literature is dedicated to the critique of this concept of understanding property as a 'bundle' including on the grounds that 'Honoré's taxonomy assumes an integrated conception of property without supplying one': Eric R Claeys, 'Bundle-of-Sticks Notions in Legal and Economic Scholarship' (2011) 8(3) *Econ Journal Watch* 205, 206. See generally Daniel B Klein and John Robinson, 'Property: A Bundle of Rights? Prologue to the Property Symposium' 8(3) *Econ Journal Watch* 193 outlining the arguments for and against understanding property as a bundle of rights. Regardless of these critiques and deeper philosophical inquiries, it will suffice herein as a useful mechanism to understand the basics of a Western conception of property which stands in stark contrast to Indigenous understandings.

54 See John R Commons, *The Distribution of Wealth* (Macmillan, 1893) 92, quoted in Klein and Robinson (n 53) 196; John Maurice Clark, *Social Control of Business* (McGraw-Hill, 1939) 94, quoted in Klein and Robinson (n 53) 197. See also Alexander A Bauer, 'New Ways of Thinking about Cultural Property: A Critical Appraisal of the Antiquities Trade Debates' (2008) 31(3) *Fordham International Law Journal* 690, 697.

55 Everett V Abbot, *Justice and the Modern Law* (Houghton Mifflin, 1913) 24–5, quoted in Klein and Robinson (n 53) 197.

56 See Lindsey L Wiersma, 'Indigenous Lands as Cultural Property: A New Approach to Indigenous Land Claims' (2005) 54(4) *Duke Law Journal* 1065, 1065.

57 John Locke, *The Second Treatise on Civil Government* (Prometheus Books, 1986) 102–3, cited in Wiersma (n 56) 1065.

dispossession but rather as creating economic use out of land and resources that were being 'wasted' by Indigenous peoples whose land tenure systems did not reflect European cultivation patterns.[58]

The cosmovision or worldview of Indigenous peoples in relation to property is rooted in the interconnectedness of land, resources, culture and self-determination.[59] It stands in contrast to this Western understanding. As Alexander Bauer notes, 'Western notions of property — both "real" and "intellectual" — have established a system whereby anything can be isolated, decontextualized, packaged for consumption, marketed, and traded — in short commodified'.[60] Such a notion goes against Indigenous understandings of property that assert, '[n]o person "owns" or holds as "property" living things. Our Mother Earth and our plant and animal relatives are respected sovereign living beings with rights of their own in addition to playing an essential role in our survival.'[61] In essence, for Indigenous peoples 'property' represents a relationship among human beings, animals, plants and places with which culture is associated and economic rights do not take the fore.[62] 'The European concept of the natural world, knowledge and culture as "property" (therefore commodities to be exploited freely and bought and sold at will) has resulted in disharmony between human beings and the natural world' and the current environmental crisis that is threatening all life.[63] This concept is 'incompatible with a traditional Indigenous world view'.[64] Indeed, private property was not a feature of the Indigenous way of life for many Indigenous peoples prior to interaction with Europeans. Rather, what emerges from this understanding is a different bundle of features that Indigenous peoples associate with property, including its collective and intergenerational nature as well as being bound closely with culture and self-determination and so the very survival of Indigenous peoples.

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58 Wiersma (n 56) 1063, 1065 (citations omitted).

59 See ibid 1063–4, 1082; Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, 2010) chs 5–6; Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge University Press, 2007) 209.

60 Bauer (n 54) 697.

61 See Xanthaki (n 59) 209, quoting International Indian Treaty Council, *Biological Diversity and Biological Ethics* (Discussion Paper, 30 August 1996) 5.

62 See Xanthaki (n 59) 209.

63 See International Indian Treaty Council (n 61) 5, quoted in Xanthaki (n 59) 209.

64 See International Indian Treaty Council (n 61) 5, quoted in Xanthaki (n 59) 209.

2 *The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 and Indigenous Cosmovision*

The *Te Awa Tupua Act* reflects this cosmovision of Indigenous peoples — in particular the *tikanga* Māori (Māori custom and values)[65] — through its understanding of the River, its creation of a model of co-governance and co-management for the River and finally its recognition of the River as a legal person.[66]

The *Te Awa Tupua Act* captures the essence of Te Awa Tupua in the provision regarding *Tupua te Kawa*,[67] which must be set out in full to understand and appreciate it. *Tupua te Kawa* encompasses the intrinsic values that represent the essence of Te Awa Tupua, specifically:

> *Ko Te Kawa Tuatahi*
>
> (a) *Ko te Awa te mātāpuna o te ora*: the River is the source of spiritual and physical sustenance:
>
> Te Awa Tupua is a spiritual and physical entity that supports and sustains both the life and natural resources within the Whanganui River and the health and well-being of the iwi, hapū, and other communities of the River.
>
> *Ko Te Kawa Tuarua*
>
> (b) *E rere kau mai i te Awa nui mai i te Kahui Maunga ki Tangaroa*: the great River flows from the mountains to the sea:
>
> Te Awa Tupua is an indivisible and living whole from the mountains to the sea, incorporating the Whanganui River and all of its physical and metaphysical elements.
>
> *Ko Te Kawa Tuatoru*
>
> (c) *Ko au te Awa, ko te Awa ko au*: I am the River and the River is me:
>
> The iwi and hapū of the Whanganui River have an inalienable connection with, and responsibility to, Te Awa Tupua and its health and well-being.
>
> *Ko Te Kawa Tuawhā*
>
> (d) *Ngā manga iti, ngā manga nui e honohono kau ana, ka tupu hei Awa Tupua*: the small and large streams that flow into one another form one River:

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65 The Māori worldview is well documented. See generally Catherine J Iorns Magallanes, 'Maori Cultural Rights in Aotearoa New Zealand: Protecting the Cosmology that Protects the Environment' (2015) 21(2) *Widener Law Review* 273; Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) ('*Ko Aotearoa Tēnei Report*'). For articles that set out a Māori worldview applicable to conservation in particular, see Phil O'B Lyver et al, 'Building Biocultural Approaches into Aotearoa: New Zealand's Conservation Future' (2018) (Special Issue: Conservation) *Journal of the Royal Society of New Zealand* 1; Sanders (n 22) 211.

66 See *Te Awa Tupua Act* (n 7) ss 11, 64, 69.

67 Ibid s 13.

> Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the health and well-being of Te Awa Tupua.[68]

It is clear that Te Awa Tupua embraces a number of different parts yet is considered to be an indivisible single entity by the law. Such beautiful language, rare for legislation, reflects *tikanga* Māori that people are only one part of many that nature encompasses in an interdependent world. People are not considered dominant in the world; instead all parts co-exist equally. Therefore, natural resources cannot be owned.[69] Rather, the Whanganui iwi live by the principle of *kaitiakitanga* (obligation to nurture and care).[70] They hold a deep respect for the nature as they consider it to be their *tupuna* (ancestor) and as part of this relationship they are responsible for its care and protection.[71] This principle of *kaitiakitanga* flows from the Māori understanding that the environment is part of their broader family. They refer to this as *whanaungatanga* (kinship) which encompasses the relationships between people living and those who have passed on, the environment and the spiritual world.[72] People do not have rights of ownership over their family; instead, the environment must be respected, cared for and protected.

Beyond this understanding of the River, the co-governance and co-management scheme created by the *Te Awa Tupua Act* also reflects an Indigenous cosmovision. It requires the Whanganui iwi and the government to work together to implement and achieve governance over, and management of, the River together. It is rooted in Te Pou Tupua, the representative who acts in the interests of Te Awa Tupua.[73] During the discussion of the Bill in Parliament, the Hon David Clendon poetically stated it thus:

> I think it is true to say that any person who sits alongside a river or sits quietly in a forest will hear the voice of that river, will hear the voice of that forest. In a more pragmatic sense, and a more practical sense, the river will require a human voice, and this legislation does allow for that: Te Pou Tupua, the human voice of the river.[74]

Te Pou Tupua is made up of two people, one acting on behalf of Whanganui iwi and one acting on behalf of the government.[75] It is responsible for administering a fund for the purpose of supporting the health and well-being of Te Awa Tupua.[76] It has an advisory and strategy group, Te Karewao and Te Kōpuka respectively, to provide advice and support to it.[77] This office is very symbolic — it requires the government and Whanganui iwi to work together to

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68 Ibid.

69 See Iorns Magallanes (n 65) 275.

70 See *Ko Aotearoa Tēnei Report* (n 65) 5, 23.

71 See Ibid 23. Ruru, 'Indigenous Restitution in Settling Water Claims' (n 22) 344.

72 See *Ko Aotearoa Tēnei Report* (n 65) 5, 23; Iorns Magallanes (n 65) 280.

73 *Te Awa Tupua Act* (n 7) ss 18–19, 64.

74 New Zealand, *Parliamentary Debates*, House of Representatives, 14 March 2017, 16662 (David Clendon) ('*Parliamentary Debates 2017*').

75 *Te Awa Tupua Act* (n 7) ss 20(1)–(2).

76 Ibid ss 57–8. The fund is called *Te Korotete* and is made up of contributions from the Crown and other funding sources.

77 Ibid ss 27, 29–30.

provide a united front in presenting the interests of Te Awa Tupua. Beyond Te Pou Tupua, the *Te Awa Tupua Act* also protects the Māori cosmovision by stipulating that only persons knowledgeable about the *Act* are able to determine matters that relate to Te Awa Tupua.[78] There is a register of hearing commissioners who are persons qualified to hear and determine applications under the *RMA* for resource consents relating to Te Awa Tupua and for activities in its catchment that affect it.[79] It ensures that the consent authority under the *RMA* must consider any effect on Te Awa Tupua despite any provision to the contrary.[80] Those included on this register must have skills, knowledge and experience in a range of disciplines explicitly including *tikanga* Māori, knowledge of the River and an understanding of Te Awa Tupua.[81]

Beyond co-government and co-management, the *Te Awa Tupua Act* also reflects the cosmovision of Indigenous eoples and in particular *tikanga* Māori through its grant of legal personality.[82] In making this grant, the *Act* describes the application of this personality to 'an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and meta-physical elements'.[83] This grant of legal personality recognises the normal physical demarcations associated with Western conceptions of property and natural resources. Yet significantly it also incorporates *tikanga* Māori through inclusion of the language 'meta-physical' which reflects the cultural significance of the river and natural resources to Māori.

> [F]or indigenous people, not least of all Māori, there is no such barrier to assigning legal rights and agency and personhood to natural objects, because we as Māori understand we are linked through *whakapapa* [genealogy] to our mountains, to our rivers, to our *moana* [ocean], to our forests.[84]

In *tikanga* Māori gods and spirits inhabit the world and all that is in it.[85] Therefore, the environment and its natural resources such as mountains and rivers, for example, have not only a physical importance to Māori but also a spiritual one. The Māori relationship with water can be described in a number of different ways and incontrovertibly one of the ways it can be described is cultural.[86] The Waitangi Tribunal's *Mohaka River Report* notes that for Māori in general, water is their taonga (treasure).[87] Water is central to identity, life, the economy and spirituality.[88] In turn, this description and grant of legal personality

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78 Ibid s 20.

79 Ibid s 61.

80 Ibid s 63. The provisions referred to are ss 95D(e) and 104(3)(a)(ii) of the *Resource Management Act* (n 36).

81 *Te Awa Tupua Act* (n 7) s 62(2).

82 Ibid s 14.

83 Ibid s 12.

84 *Parliamentary Debates 2017* (n 74) 16662 (emphasis added).

85 See above 10–11.

86 See 'Māori Values: In the "Protecting New Zealand's Rivers"', *Department of Conservation: Te Papa Atawhai* (Web Page) <https://www.doc.govt.nz/about-us/statutory-and-advisory-bodies/nz-conservation-authority/publications/protecting-new-zealands-rivers/02-state-of-our-rivers/maori-values/>, archived at <https://perma.cc/Q8JP-N3YD>; Ruru, 'Indigenous Restitution in Settling Water Claims' (n 22) 315. See also *Resource Management Act* (n 36) s 6.

87 See Waitangi Tribunal, *The Mohaka River Report 1992* (Wai 119, 1992) 10–13.

88 See ibid; *Te Awa Tupua Act* (n 7) s 69.

incorporates *tikanga* Māori in relation to water. In fact, in the *Te Awa Tupua Act* the Crown directly

> acknowledges that to Whanganui Iwi the enduring concept of Te Awa Tupua — the inseparability of the people and the River — underpins the responsibilities of the iwi and hapū of Whanganui in relation to the care, protection, management, and use of the Whanganui River in accordance with the kawa and tikanga maintained by the descendants of Ruatipua, Paerangi, and Haunui-a-Paparangi.[89]

Ultimately, the *Te Awa Tupua Act* reflects the cosmovision of Māori by acknowledging Te Awa Tupua, as a living being, giving recognition to, and understanding of, *tikanga* Māori. Indeed, during the drafting of the *Act*, co-leader of the Green Party, David Clendon, noted:

> I think it is remarkable that this bill does embed one of the fundamental beliefs and values of Te Ao Māori: the notion of connectedness with the natural world, and human beings as part of it. It embeds that deeply into statute, into New Zealand law, in the same way that *Te Urewera Act* did. I think that as well as being significant and important as an empowerment of Te Ao Māori and Māori beliefs, it is also a very powerful assertion of tino rangatiratanga, the notion that we Māori, as others will, will determine our own futures, and that we should allow the non-human elements of our world — in this case, the river — to also have a hand and a say in asserting their own futures. This legislation, I believe, will lead directly, assuming a happy outcome in terms of implementation, to a restoration of the mauri of our largest river, a river that is one of the most significant features in this country, and in our cultural world, as well. I would be so bold as to quote Gerrard Albert, the negotiator of Ngā Tāngata Tiaki o Whanganui, who said that '[t]he point is to approximate at law what the river is to us in custom and kawa: a living tupuna, not an inanimate, lifeless resource to be used without regard to its mana'.[90]

B *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 and International Human Rights Law: Resources, Land, Culture and Self-Determination*

Consequently, in its recognition of an Indigenous worldview, the *Te Awa Tupua Act* also reflects the ethos of the increased protections for Indigenous peoples entrenched in international human rights law in relation to natural resources, land, culture and redress. This synergy represents a sui generis approach to resource management and protection which can be justified in light of the aforementioned processes of commodification which results in the loss of the land, resources and identity of Indigenous peoples.[91]

International human rights law increasingly incorporates the cosmovision of Indigenous peoples. The most notable example of this incorporation is in the principal mechanism for the protection of Indigenous rights under human rights law, the *United Nations Declaration on the Rights of Indigenous Peoples*

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89 *Te Awa Tupua Act* (n 7) s 69(2).

90 *Parliamentary Debates 2017* (n 74) 16662.

91 On the commodification of land, see above Part III(A)(1).

('*UNDRIP*').[92] The *UNDRIP* was a product of intense negotiation between states and Indigenous peoples which lasted over 20 years.[93] The overarching agenda of the *UNDRIP* focuses on promoting and protecting the distinctiveness of Indigenous peoples in light of the shared historical and ongoing wrongs that they have suffered at the hands of dominant society which are typically rooted in programs of discrimination and marginalisation.[94] In addressing such wrongs and providing redress, it is emphasised that the *UNDRIP* is understood to represent the 'minimum standards' necessary for the 'survival, dignity and well-being of the indigenous peoples of the world'[95] and therefore does not seek to privilege Indigenous peoples but to ensure their equality with other peoples.[96] It is a mechanism 'to fill a crucial gap' and 'to guarantee coherence' in international human rights law which is typified by different approaches to Indigenous claims and rights.[97]

The *UNDRIP* scheme for the protection of Indigenous land and natural resources is located in arts 25–7.[98] Articles 25 and 26(1) detail rights with respect to lands, territories and resources in relation to those traditionally owned or otherwise occupied and to those historically used that may no longer be owned, occupied or used by Indigenous peoples.[99] Article 25 recognises the right of Indigenous peoples to maintain and strengthen their spiritual relationship with such lands, territories and resources and to 'uphold their responsibilities to future generations in this regard'.[100] Article 26(1) is broader than art 25, providing that 'Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'.[101] Article 26(2) further provides that

> Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or

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92 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/Res/61/295 (2 October 2007, adopted 13 September 2007) art 8 ('*UNDRIP*'). See Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22(1) *European Journal of International Law* 121, 123–6.

93 'Historical Overview', *United Nations Department of Economic and Social Affairs* (Web Page) <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples/historical-overview.html>, archived at <https://perma.cc/P77U-GX29>.

94 Articles 5, 8(2)(a), 25 and 34 of *UNDRIP* specifically promote the distinctiveness of Indigenous peoples. Article 8 of *UNDRIP* encapsulates many of these wrongs that Indigenous peoples have suffered and continue to suffer. As Ronald Niezen notes, 'Indigenous peoples, like some ethnic groups, derive much of their identity from histories of state-sponsored genocide, forced settlement, relocation, political marginalization, and various formal attempts at cultural destruction': Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, 2003) 5.

95 *UNDRIP*, UN Doc A/RES/61/295 (n 92) art 43.

96 Ibid Preamble para 2.

97 Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58(4) *International and Comparative Law Quarterly* 957, 959.

98 *UNDRIP*, UN Doc A/RES/61/295 (n 92) arts 25–7.

99 Ibid arts 25, 26(1).

100 Ibid art 25.

101 Ibid art 26(1).

> other traditional occupation or use, as well as those which they have otherwise acquired.[102]

Article 27 requires states, in conjunction with Indigenous peoples, to create a process to recognise and adjudicate the rights of Indigenous peoples to their lands, territories and resources, including those traditionally owned or otherwise used or occupied.[103] In the context of Aotearoa New Zealand this right is fulfilled by the creation of the Waitangi Tribunal.

As aforementioned, an Indigenous cosmovision understands the intimate connection among land, resources, culture and self-determination.[104] Traditionally, international human rights law has not understood nor reflected this cosmovision. This can be explained by its history of the relegation of cultural rights as well as its adherence to, and incorporation of, a 'Lockean' understanding of property at the expense of Indigenous peoples until very recently.[105] However, these provisions of the *UNDRIP*, in conjunction with the following judgements of the Inter-American Court of Human Rights ('IACtHR'), represent a sea-change. In recognising not only communal property and the restitution of land to Indigenous peoples, but also the inextricable link between the protection of Indigenous land and resources and the protection of culture, these judgements thereby incorporate this cosmovision.

In *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, the IACtHR found that Nicaragua had violated the right to property enshrined in art 21 of the *American Convention on Human Rights*.[106] In doing so, the Court recognised the link between culture and the norm of cultural integrity to land, as well as the right to property, in particular, the right to property under its Indigenous understanding as communal property.[107] Flowing from this understanding, the State had an obligation to delimit, demarcate and issue titles to the community in accordance with their customary law and Indigenous values, uses and customs, as well as to abstain from granting further concessions and to provide reparations.[108] Subsequent decisions of the IACtHR have confirmed the Court's use of the right to property as a tool to secure Indigenous culture and identity, and in particular, a right to communal property including reparations for violations rooted in recognition and protection of an Indigenous cosmovision. In *Yakye Axa Indigenous Community v Paraguay* the IACtHR again found a violation of the right to property under art 21.[109] Aside from the links among land, cultural identity and heritage, which were of importance in finding this

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102 Ibid art 26(2).

103 Ibid art 27.

104 See above Part III(A)(1).

105 See generally Engle (n 59) chs 5–6. 'Lockean' understanding refers the European understanding of Indigenous peoples having no rights to land and resources that they did not cultivate, as espoused by John Locke: see above Part III(A)(1).

106 *Mayagna (Sumo) Awas Tingni Community v Nicaragua (Judgment)* (Inter-American Court of Human Rights, Series C No 79, 31 August 2001) [153], [155] ('*Mayagna v Nicaragua*'). *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) art 21.

107 *Mayagna v Nicaragua* (n 106) [149], [151].

108 Ibid [150]–[155].

109 See *Yakye Axa Indigenous Community v Paraguay (Merits, Repatriations and Costs)* (Inter-American Court of Human Rights, Series C No 125, 17 June 2005) [131]–[135].

violation, the Court also emphasised the importance of the broader Indigenous cosmovision.[110] Building on these cases, in *Sawhoyamaxa Indigenous Community v Paraguay* the IACtHR explicitly noted that this cosmovision does not necessarily correspond to classical Western conceptions of property in terms of ideas regarding possession and control; yet this understanding is equally as deserving of the equal protection of the law and failure to protect such an understanding would make the art 21 right to property 'illusory for millions of persons'.[111] In *Saramaka People v Suriname*, the Court provided that for violations of the art 21 right to property there is the possibility of special measures to ensure for 'members of indigenous and tribal peoples the full and equal exercise of their right to the territories they have traditionally used and occupied'.[112] This development was again rooted in recognition of an Indigenous cosmovision.[113] More recently, in *Kichwa Indigenous People of Sarayaku v Ecuador*, the IACtHR laid out the importance of interpreting art 21 as a communal property right in line with an Indigenous cosmovision, stressing that without such protection, art 21 would have little meaning for Indigenous peoples:

> In other words, the right to use and enjoy the territory would be meaningless for indigenous and tribal communities if that right were not connected to the protection of natural resources in the territory. Therefore, the protection of the territories of indigenous and tribal peoples also stems from the need to guarantee the security and continuity of their control and use of natural resources, which in turn allows them to maintain their lifestyle. This connection between the territory and the natural resources that indigenous and tribal peoples have traditionally used and that are necessary for their physical and cultural survival and the development and continuation of their worldview, must be protected under Article 21 of the *Convention* to ensure that they can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by the States.[114]

IV *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*: Recognising Indigenous Rights?

Given its recognition of an Indigenous worldview which reflects the ethos of the increased protections for Indigenous peoples entrenched in international human rights law in relation to natural resources, land, culture and redress, the *Te*

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110 Ibid [131], [135].

111 *Sawhoyamaxa Indigenous Community v Paraguay (Merits, Repatriations and Costs*) (Inter-American Court of Human Rights, Series C No 146, 29 March 2006) [120].

112 *Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C No 172, 28 November 2007) [91].

113 Ibid [90]. The Court draws on the consideration of indigenous understandings of property in the aforementioned cases: at [89].

114 *Kichwa Indigenous People of Sarayaku v Ecuador (Merits and Reparations*) (Inter-American Court of Human Rights, Series C No 245, 27 June 2012) [146].

Awa Tupua Act has received praise at home and abroad.[115] Over 200 descendants of the Whanganui iwi went to Parliament to witness passage of the *Act*.[116] In its *Concluding Observations on the Combined Twenty-First and Twenty-Second Periodic Reports of New Zealand*, regarding the implementation of Aotearoa New Zealand's treaty obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*, the United Nations noted with praise the adoption of the *Te Awa Tupua Act*.[117] In particular, it applauded the government's efforts to engage and consult with iwi regarding their freshwater rights.[118] However, in terms of making the substantial gains which international human rights law offers Indigenous peoples, the *Act* falls short. The government of Aotearoa New Zealand has been left wanting in its commitments under the *UNDRIP* by failing to offer the Whanganui iwi the ownership of freshwater that they have consistently sought.[119]

As noted, the *UNDRIP* provides Indigenous peoples with protections for their lands, territories and resources. Article 26(2) offers that 'Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they *possess*'.[120] The express wording of this provision is in the present tense which suggests that rights in relation to the lands, territories and resources no longer under the control of Indigenous peoples, as in art 26(1), might be more limited; including limits on the right to return. However, the River has been found to be at least in the possession of the Whanganui iwi. In effect, this is acceptance, at least in part, of their claim for native title to water.

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115 See, eg, 'Historic Inauguration Ceremony Welcomes Te Pou Tupua', *Scoop Independent News* (online, 5 November 2017) <http://www.scoop.co.nz/stories/PO1711/S00060/historic-inauguration-ceremony-welcomes-te-pou-tupua.htm?from-mobile=bottom-link-01>, archived at <https://perma.cc/3F27-2SBK>; 'Horizons Welcomes Whanganui River Treaty Settlement', *Horizons Regional Council* (online, 16 March 2017) <http://www.horizons.govt.nz/news/horizons-welcomes-whanganui-river-treaty>, archived at <https://perma.cc/Q2RZ-KH7U>; Julian Brave NoiseCat, 'The Western Idea of Private Property Is Flawed: Indigenous Peoples Have It Right', *The Guardian* (online, 27 March 2017) <https://www.theguardian.com/commentisfree/2017/mar/27/western-idea-private-property-flawed-indigenous-peoples-have-it-right>, archived at <https://perma.cc/4BLY-4AKH>; 'India Makes Ganges a Person; Praises Whanganui River Laws', *Whanganui Chronicle* (online, 24 March 2017) <https://www.nzherald.co.nz/wanganui-chronicle/news/article.cfm?c_id=1503426&objectid=11823920>, archived at <https://perma.cc/9GWS-6FPA>.

116 See 'Te Awa Tupua Passes in to Law', *Scoop Independent News* (online, 15 March 2017) <http://www.scoop.co.nz/stories/PO1703/S00187/te-awa-tupua-passes-in-to-law.htm>, archived at <https://perma.cc/6UNK-SE93>.

117 Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Twenty-First and Twenty-Second Periodic Reports of New Zealand*, UN Doc CERD/C/NZL/CO/21-22 (22 September 2017) [3].

118 Ibid [22].

119 Whilst the *Te Awa Tupua Act* provides for co-management and co-governance, it does not vest ownership of the River with the Whanganui iwi: see Sanders (n 22) 209. As the *UNDRIP* is a declaration, it is not binding on domestic courts in Aotearoa New Zealand because it is not binding in international human rights law. Further there has not been any legislation by Parliament in Aotearoa New Zealand to enact the *UNDRIP*. However, this inquiry is still valuable. In signing the *UNDRIP*, Aotearoa New Zealand has indicated its commitment to uphold the rights contained therein and it is widely recognised as the yardstick by which to measure the implementation and fulfilment of other human rights. See generally Kiri Toki, 'Ko Ngā Take Ture Miorā: Māori Rights and Customary International Law' (2012) 18 *Auckland University Law Review* 250.

120 *UNDRIP*, UN Doc A/RES/6/295 (n 92) art 26(2) (emphasis added).

Native title, as understood in the courts of Aotearoa New Zealand, offers:

> On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title which goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But, at least in the absence of special circumstances displacing the principle, the radical title is subject to existing native rights.[121]

After a long and convoluted history, the doctrine was reintroduced into Aotearoa New Zealand in *Attorney-General v Ngati Apa*.[122] The legal test for native title requires that Māori have a recognised customary property interest and that the government fails to prove that statutory law has clearly and plainly extinguished the property right.[123] However, the doctrine explicitly foresees the possibility of native title as a means to recognise exclusive ownership in land, not freshwater.[124] Yet, as Jacinta Ruru and the Waitangi Tribunal conclude, this doctrine is applicable to the latter, including rivers. According to Ruru, given that the purpose of the doctrine is to protect Indigenous peoples' property, limiting it to land would serve no purpose other than farce.[125] In the context of the Whanganui River, the Waitangi Tribunal accepted such an interpretation and ultimately found Māori had ownership of the water.[126] The *Whanganui River Report*, which preceded the *Te Awa Tupua Act*, concluded that the Whanganui iwi owned the whole of the Whanganui River 'inclusive of the water and all those things that gave the river its essential life'.[127] Relying explicitly on the doctrine of native title, the Tribunal reached this conclusion on the grounds that Aotearoa 'New Zealand was not colonised on the basis that rivers were publicly owned'.[128] In turn, the control of rivers was never vested in the government.[129] Therefore, this guaranteed the Whanganui iwi their continued full, exclusive and undisturbed possession of and authority over the river, as affirmed by the *Treaty of Waitangi*.[130] As the Whanganui iwi were never dispossessed of these rights in the manner envisioned by the *Treaty of Waitangi* — through 'free and willing disposal'[131] — the Whanganui River, inclusive of the water, continued to remain in their possession.[132] More broadly, in its *Stage 1 Report on the National*

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121 *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20, 23–4.

122 *Attorney-General v Ngati Apa* [2003] 3 NZLR 643, 643, 701 (Tipping J). Ruru provides an excellent concise account of this history: Jacinta Ruru, 'Property Rights and Māori: A Right to Own a River?' in Klaus Bosselmann and Vernon Tava (eds), *Water Rights and Sustainability* (New Zealand Centre for Environment Law, 2011) vol 3, 51, 54–64 ('Property Rights and Māori').

123 Ruru, 'Property Rights and Māori' (n 122) 64.

124 Ibid 51–76.

125 Ibid 65.

126 Waitangi Tribunal, *The Whanganui River Report* (Wai 167, 1999) 340 ('*Whanganui River Report*'). Courts in Aotearoa New Zealand are not bound by opinions of the Tribunal. Although the courts maintain that the Tribunals opinions 'are of great value to the Court' and 'are entitled to considerable weight' they ultimately remain free to dismiss its statements: Ruru, 'Property Rights and Māori' (n 122) 57.

127 *Whanganui River Report* (n 126) 340.

128 Ibid 335.

129 Ibid 335–6, 340.

130 *Treaty of Waitangi Act* (n 13) sch 1 art 2. *Whanganui River Report* (n 126) 338.

131 *Whanganui River Report* (n 126) 340.

132 Ibid 335–40.

Freshwater and Geothermal Resources Claim, the Tribunal noted that, consistent with earlier Waitangi Tribunal reports on water, Māori had rights and interests in water bodies in 1840 — at the time of the *Treaty of Waitangi*.[133] Furthermore, such rights and interests most closely approximated legal ownership, including the exclusive right to control access to, and use of, the water.[134] Although the signing of the *Treaty of Waitangi* had significant effects on these rights in that it has been understood that Māori have shared their rights to water by the grant of non-exclusive use rights to incoming settlers, the fact remains that Māori retain residual property rights in water.[135]

Although the government has not recognised Māori ownership of water in general, the above demonstrates that the Whanganui iwi at least remain in possession of the Whanganui River through the doctrine of native title as it canvasses a variety of proprietary interests. Indeed, native title 'encompasses a wide spectrum where exclusive ownership falls to the far right'.[136] Under *UNDRIP* art 26(2), possession of resources 'by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired' entitles Indigenous peoples to ownership.[137] As a result, the *Te Awa Tupua Act* does not live up to Aotearoa New Zealand's commitments under international human rights law to the extent that it is solely a grant of legal personality. As such it does not vest ownership of the River, understood as the water, in any person or group, and so forecloses the possibility of the ownership of interests related to the water. This is despite the fact that such ownership is open to Indigenous peoples under *UNDRIP* art 26(2) and has been consistently sought by the Whanganui iwi.[138] Te Awa Tupua is the physical and metaphysical elements of the Whanganui River.[139] A river is by definition, 'a large natural stream of fresh water flowing along a definite course'.[140] Water is the crucial element of a river because without water, there is only a dry channel of land. Under the *Te Awa Tupua Act*, Te Awa Tupua does not have proprietary rights to the water, which creates an anomaly because it does not own the very aspect of the River that makes it a river: the water. It is like saying that a natural person owns his or her skin, but not his or her blood — the life-giving substance. If others had a right to use, take or pollute the blood of that person, the consequences of those actions could be significant, even leading to death. Te Awa Tupua is comprised of the River and yet it has very little control over many of the parts that make it whole.[141] Although the Western legal device of a grant of legal personality is more akin to the Māori worldview of a river as an

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133 Waitangi Tribunal, *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) 80–1 ('*Stage 1 Report*').

134 Ibid.

135 Ibid 81.

136 Jacinta Ruru, 'Maori Legal Rights to Water: Ownership, Management or Just Consultation?' (Conference Paper, Resource Management Law Association, 1 October 2010) 4.

137 *UNDRIP*, UN Doc A/RES/61/295 (n 92) art 26(2).

138 *Te Awa Tupua Act* (n 7) pt 2.

139 Ibid s 12.

140 *Collins English Dictionary* (online at December 2017) 'water' (def 1).

141 In this way, 'the indigenous concept of the river being an indivisible whole is not being fully legally recognized': Iorns Magallanes (n 65) 318.

indivisible whole which has its own 'life force',[142] this is a major drawback for Māori as the ownership of freshwater remains a priority. Indeed Māori have long argued for the right to own freshwater and in particular the Whanganui iwi have sought ownership of the River.[143] In fact, the Whanganui iwi's claim over the River has been the longest running in Aotearoa New Zealand's history and they, like other Māori, often assert their rights in terms of ownership in relation to lands, territories and resources.[144] The *Te Awa Tupua Act* acknowledges that

> the iwi and hapū of Whanganui, over many generations since 1840, have maintained the position that they never willingly or knowingly relinquished their rights and interests in the Whanganui River and have sought to protect and provide for their special relationship with the Whanganui River …[145]

Many argue that Māori claims to water in terms of ownership have been a response to the imposition of Western conceptions of property. However, others assert that such ideas of ownership are part of *tikanga* Māori.[146] As James DK Morris and Jacinta Ruru note, 'just because Maori have a personified worldview, it is incorrect to assume that they will always favour non-development. Maori do not tend to ascribe to a preservation standpoint, but rather a sustainable one'.[147] Regardless of motivation, Māori have consistently responded to this commodification by asserting ownership rights. Alex Frame notes the Māori reaction in pithy fashion: 'if it is property, then it is our property!'[148]

Ultimately then, Aotearoa New Zealand's later endorsement of the *UNDRIP* in 2010 and the subsequent passage of the *Te Awa Tupua Act* in 2017 look less like a change of heart rooted in a fundamental commitment to human rights, and more like a reflection of settler-states selectively endorsing certain human rights that do not ask for, or require, any domestic change.[149] Specifically, the *Act* fails to go beyond the current ethos of human rights in its recent embrace of the Indigenous cosmovision and claims rooted in culture and identity. It does not meet the real demands of Indigenous peoples, in this case for ownership of water — a demand that might not fit succinctly into this worldview. The *Act*'s focus on cultural aspects comes at the expense of claims to property and so fails to provide the real material gains that human rights law purports to offer Indigenous peoples. Consequently, the *Act* reflects the gloss but not the substance of human rights; its bark without its bite.

The use of legal personality, which ensures that the *Te Awa Tupua Act* adheres to gloss and not substance of human rights, is unsurprising upon

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142 See Morris and Ruru (n 14) 58. See generally Ruru, 'Indigenous Restitution in Settling Water Claims' (n 22).

143 See generally *Whanganui River Report* (n 126).

144 Ibid viii. Te Maire Tau, *Water Rights for Ngāi Tahu: A Discussion Paper* (University of Canterbury Press, 2017) 15.

145 *Te Awa Tupua Act* (n 7) s 69(5).

146 See generally Tau (n 144).

147 Morris and Ruru (n 14) 58.

148 Frame (n 22) 234 (emphasis omitted).

149 The Aotearoa New Zealand government's endorsement of *UNDRIP* in 2010: New Zealand, *Parliamentary Debates*, House of Representatives, 20 April 2010, 10229–37. For a discussion on this selective endorsement, see generally Sheryl R Lightfoot, 'Selective Endorsement without Intent to Implement: Indigenous Rights and the Anglosphere' (2012) 16(1) *International Journal of Human Rights* 100.

examination of the contextual setting of both domestic politics in Aotearoa New Zealand, and more broadly the context of international human rights law. As regards the former, undoubtedly the *Te Awa Tupua Act* is part and parcel of the settlement process underway in Aotearoa New Zealand. As noted, the settlement is mandated by the *Treaty of Waitangi Act 1975* and is carried out by the Waitangi Tribunal.[150] A core feature of this process of political settlement involves balancing Māori and Pākehā interests. In this case, it is a carefully crafted political compromise — achieved through use of legal personality — which balances these interests by offering a 'middle ground between vesting title in the iwi and refusing claims to anything other than co-management'.[151] In turn, it seems likely that we will see the use of legal personality again and again for treaty settlements concerning limited resources;[152] especially in light of the fact that the use of legal personality in particular allows the government to avoid addressing the toughest issue in this balancing act: the ownership of freshwater.[153] At common law, no one owns water — it is *publici juris*.[154] On this understanding, water is vested in the government on behalf of the public. Aotearoa New Zealand adopted this doctrine from the British on colonisation.[155] The government has consistently maintained this position and reserves for itself, and itself alone, the right to grant access to water — in effect acting as the owner of all freshwater in Aotearoa New Zealand.[156] Using legal personality as a tool allows the government to maintain this doctrine while still engaging in the process of reparative justice that flows from its commitment under the *Treaty of Waitaingi*. Yet it is the use of this tool that makes such a balancing act vulnerable as it leaves the hottest legal issue, and the issue at the heart of any redress, unresolved. Indeed, as many Māori note, 'this issue "must be addressed before any major changes to water management can be considered"'.[157]

Furthermore, it is interesting to note that neither the *Ruruku Whakatupua (The Whanganui River Deed of Settlement)*[158] nor the subsequent *Te Awa Tupua Act* reference the *UNDRIP*. Given that they were negotiated within the framework of this settlement process, this omission is a missed opportunity to bolster the legitimacy of the *UNDRIP* and New Zealand's commitment to it.[159] Legitimacy

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150 See above Part I.

151 Laura Hardcastle, 'Turbulent Times: Speculations about How the Whanganui River's Position as a Legal Entity Will be Implemented and How it May Erode the New Zealand Legal Landscape' (February 2014) *Māori Law Review*.

152 Ibid.

153 Ruru, 'Property Rights and Māori' (n 122) 66.

154 Jacinta Ruru, 'Introducing Why it Matters: Indigenous Peoples, the Law and Water' (2010) 20 *Journal of Water Law* 221, 221–2 ('Indigenous Peoples, the Law and Water'), citing *Embrey v Owen* (1851) 6 Exch 353.

155 Ruru, 'Indigenous Peoples, the Law and Water' (n 154) 221–2.

156 The Crown has reserved the right to grant access: *Resource Management Act* (n 36) s 354. The Crown has also reserved rights to water more generally: see, eg, *Water and Soil Conservation Act 1967* (NZ) s 21.

157 Jacinta Ruru, *The Legal Voice of Māori in Freshwater Governance: A Literature Review* (Landcare Research, 2009) 8 (citations omitted).

158 *Ruruku Whakatupua: Te Mana o Te Awa Tupua* (n 20).

159 On the legitimising effect of coordination, see Claire Charters, 'The Legitimising Effect of Coordination between Relevant International Institutions and the Harmonisation of the Rights of Indigenous Peoples' (2015) 32(1) *Arizona Journal of International and Comparative Law* 169, 171.

here refers to 'the quality in international norms that leads states to internalize the pull to voluntarily and habitually obey these norms even when it might not be in their interest to do so'.[160] The legitimacy of norms comes from both their substance and the process by which they are made.[161] The stakes are high. Problems in either substantive and/or procedural legitimacy mean that states are less likely to comply with norms.[162] Given the legal status of the *UNDRIP* as a declaration and so a non-binding piece of international law, the stakes are even higher.[163] In turn, the failure of the Crown to reference the *UNDRIP* within this settlement process begins to look like political resistance to international human rights law. This demonstrates the adherence of Aotearoa New Zealand to the gloss, but not the substance, of such rights.

As regards the broader context of international human rights law, the use of legal personality is unsurprising when we consider the context of broader international human rights law. The drafting of the *UNDRIP* shows that there was significant opposition to the idea of restitution in relation to the lands, territories and resources of Indigenous peoples.[164] This was a major sticking point for New Zealand and in part explains why it was not an original signatory to the *UNDRIP*.[165] The *UNDRIP* was adopted by the UN General Assembly in September 2007. Of the states present, 143 voted in favour, 11 abstained and four votes against including the major settler-states of Australia, Canada, New Zealand and the United States.[166] New Zealand's opposition to the *UNDRIP* coalesced around four different themes: land, resources, redress and rights of veto.[167] Upon adoption of the *UNDRIP*, the representative from New Zealand noted that her State had difficulties with numerous provisions that were deemed incompatible with the *Treaty of Waitangi*, its constitutional and legal arrangements, and the principle of good governance for all citizens.[168] Specifically, regarding art 26 (concerning land and resources) and art 28 (on redress in instances of lack of prior consent), she offered:

> [T]he provision on lands and resources cannot be implemented in New Zealand. Article 26 states that indigenous peoples have a right to own, use, develop or control lands and territories that they have traditionally owned, occupied or used. For New Zealand, the entire country is potentially caught within the scope of the Article. The Article appears to require recognition of rights to lands now lawfully

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160 Ibid.

161 Ibid (citations omitted).

162 Ibid 172.

163 For "'many States and other powerful actors, commitment to the *Declaration* is weakened … by certain ambiguities and positions about the status and content of the *Declaration*." States can manipulate the uncertainty in the meaning of such rights to the minimum extent': ibid, quoting Special Rapporteur on the Rights of Indigenous Peoples, *Rights of Indigenous Peoples*, UNGA UN Doc A/68/317 (14 August 2013) [59].

164 See Lightfoot (n 149) 109.

165 Ibid.

166 'United Nations Adopts Declaration on Rights of Indigenous Peoples', *UN News* (online, 13 September 2007) <https://news.un.org/en/story/2007/09/231062-united-nations-adopts-declaration-rights-indigenous-peoples>, archived at <https://perma.cc/GLF3-GWCV>.

167 See Lightfoot (n 149) 109.

168 Rosemary Banks, 'Declaration on the Rights of Indigenous Peoples: Explanation of Vote to the General Assembly' (Speech, United Nations, 13 September 2007) 1 <http://www.converge.org.nz/pma/DRIPNZEoV.pdf>, archived at <https://perma.cc/79E8-6Z8S>.

> owned by other citizens, both indigenous and non-indigenous, and does not take into account the customs, traditions, and land tenure systems of the indigenous peoples concerned. Furthermore, this Article implies that indigenous peoples have rights that others do not have.
>
> …
>
> [T]he entire country would appear to fall within the scope of the Article [28] … the text generally takes no account of the fact that land may now be occupied or owned legitimately by others or subject to numerous different, or overlapping, indigenous claims.[169]

V CONCLUSIONS

The *Te Awa Tupua Act* offers a platform to explore both the promotion and protection of Indigenous rights in international human rights law and in Aotearoa New Zealand. This exploration demonstrates that the *Act* is firmly within the ambit of the promotion and protection of Indigenous rights given that it flows more broadly from the recognition of the cosmovision of Indigenous peoples, which reflects human rights and, in particular, the cultural rights of Indigenous peoples. Yet this is where the reflection of human rights ends. The *Act* translates cultural rights but fails to translate the property rights secured for Indigenous peoples in international human rights law, leaving Aotearoa New Zealand wanting in its commitments under human rights law. Within the domestic setting, this inquiry demonstrates that the *Te Awa Tupua Act*, in its grant of legal personality, moves beyond mere 'window-dressing' consultation with Māori — unlike previous interactions between Māori and Pākehā in the settlement process.[170] Although this is a step forward, it still fails to secure rights of Māori as provided under the *Treaty of Waitangi*. Ultimately, this demonstrates the vulnerability of settlements like the *Te Awa Tupua Act* to politics and the hurdles to implement concrete human rights.

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169 Ibid 1–2. However, since this initial rejection New Zealand has endorsed the *UNDRIP*: New Zealand, *Parliamentary Debates*, House of Representatives, 20 April 2010, 10229 (Simon Power).

170 Ruru, 'Indigenous Recognition Devices' (n 22) 27.